



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Magneco Inc.

File: B-235338

Date: September 1, 1989

DIGEST

1. Protest of amendments to request for proposals, and of their alleged effect on protester's competitive position are untimely since the allegations were first raised before the General Accounting Office after the closing date for receipt of proposals and, otherwise, more than 10 days after the protester knew or should have known of the protest basis.
2. Where agency amended the request for proposals to reflect a significant change in the initial quantity requirement and called for revised proposals after the initial closing date for receipt of proposals, we do not find that the agency's actions were unnecessary, arbitrary or capricious, or that they constituted technical leveling or auctioneering of the procurement, since the agency's actions had the intent and effect of a request for best and final offers where all offerors submitted revisions to their price proposals and no offerors were prejudiced in the competition.
3. Protester's assertion that its price may have been disclosed to its competitor is dismissed as speculative where the allegation is based solely on the circumstances of the awardee's reduction of its price in its best and final offer and the protester's assertions that it was contacted by individuals outside the government concerning what it regarded as confidential business arrangements contained in its proposal.
4. Allegation that agency did not seriously consider protester's proposal for award because the agency did not conduct a pre-award survey on the protester following receipt of its low initial offer is dismissed as speculative since an agency is not required to conduct a survey, as the determination to do so is within the discretion of the contracting officer.

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5. Where, as a result of a corporate transfer in which the successor corporation to a previously approved government contractor becomes the ultimate recipient of a contract restricted to approved sources, the successor corporation may be determined to meet the qualifying requirement if the sale of assets included all aspects of the business that will be required to execute the contract properly.

DECISION

Magneco Inc. protests the award of a contract under request for proposals (RFP) No. F0406-88-R-28126, issued by the Department of the Air Force, Sacramento Air Logistics Center, for ground radar focus coil tubes. The RFP was restricted to previously approved sources. Magneco contends, in essence, that the Air Force conducted the procurement in a manner that caused it to be unfairly denied the award of the contract.

We dismiss the protest in part and deny it in part.

In July 1988, the Air Force synopsisized a foreign military sales (FMS) requirement for four each focus coil tubes, federal stock class (FSC) 5950, and listed Varian Associates, Inc., as the only approved source. The synopsis stated, however, that offers from all responsible sources would be accepted and considered. The subsequently issued RFP contemplated a fixed-price contract for the four focus coil tubes and stipulated that award of the contract might be made on the basis of initial offers received, without discussions.

The RFP was later amended to include an additional quantity of 32 each focus coil tubes (the same FSC as that of the initial requirement) to meet an Air Force requirement and established a closing date of October 15. A second amendment further extended the closing date to October 21. Of the two offerors who responded to the RFP on October 21--Magneco and Varian--Magneco's total proposed price of \$304,200 (\$8,450 per unit) was \$90,625 lower than Varian's proposed price of \$394,825 (\$10,967 per unit). Magneco was approved as a source for providing the requirement on November 29.

The agency states, however, that in view of two additional FMS requirements and four additional Air Force requirements for focus coil tubes, which the procuring activities notified the agency of on December 21 and January 23, respectively, it issued amendment 0003 on January 24, 1989, for a minimum quantity of 42 each focus coil tubes and a maximum quantity of 65 each to cover a 24-month ordering

period. In addition to increasing the quantity, that amendment extended the closing date to March 1, 1989, listed both Magneco and Varian in the RFP as approved ("previously identified") sources, and listed the RFP requirement as FSC 5895 instead of FSC 5950 as it had been listed previously. The amendment also added to the RFP the Air Force Logistics Command (AFLC) Competition for Performance Program clauses, as a part of which a "Blue Ribbon" contractor list is established for the procurement of certain FSC items, including FSC 5895.

Under the Competition for Performance Program, a contractor's "membership" on a "Blue Ribbon" contractor list (which is by application only) "indicates a contractor has demonstrated dependable quality and delivery performance on AFLC contracts" for the applicable items during the previous year and, therefore, need not submit past performance data with its offer as is required of an offeror which is not on the "Blue Ribbon" contractor list for the relevant FSC.

The record indicates that prior to the issuance of amendment 0003, Magneco had advised the Air Force, by letter dated January 6, 1989, of its objection to any disclosure by the agency through an amendment that Magneco had been approved as a source for the requirement. Magneco argued to the agency that the real purpose of such an amendment would be to inform Varian (which according to the protester has been the sole source supplier of the focus coil tubes for the past 22 years) of Magneco's status as an approved source. Nevertheless, the agency did proceed with the issuance of amendment 0003 on January 24. The agency states that after the issuance of amendment 0003, Magneco also objected to the change in the requirement from FSC 5950 to 5895 and the inclusion of "Blue Ribbon" clauses in the solicitation. Magneco objected to these changes because it considered the changes to favor award to Varian as opposed to Magneco since it was aware that a division of Varian (though not the competing division) has "Blue Ribbon" status with respect to FSC 5895, but Magneco does not. In response to Magneco's objection to the changes in FSC numbers and inclusion of the "Blue Ribbon" clauses, the agency acknowledged that it changed the FSC number in error, and on February 22, issued amendment 0004, which included the correction of the FSC number and the deletion of the "Blue Ribbon" clauses.^{1/}

^{1/} The agency states that it included the clauses in the revised RFP because it is now its practice to include them in all competitive solicitations, regardless of the FSC number.

In their March 1 proposals, revised and submitted in response to the changed requirements reflected in amendments 0003 and 0004, both Varian and Magneco lowered the prices which they had offered in their October 21 proposals. The RFP provided that award would be made to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the government, cost or price and any other factors specified in the solicitation considered. Since Varian's revised total proposed price of \$500,500 (\$7,700 per unit) was lower than that of Magneco, whose revised total proposed price was \$544,375 (\$8,375 per unit), award was made to Varian.

The protester here contends that even though it submitted the low offer on the October 21 closing date, the Air Force improperly failed to award the contract to Magneco at that time and subsequently prevented the firm from receiving the award by issuing "numerous" unnecessary amendments to the solicitation to provide Varian an opportunity to underprice Magneco's offer. The protester expresses the view that since "options, multiple add-on's and next year requirements have been added very often to existing contracts" the issuance of amendment 0003 for the additional requirements after the initial closing date not only unnecessarily delayed the award, to its detriment, but was arbitrary and capricious. The protester also maintains that the agency's improper inclusion of the "Blue Ribbon" clauses and subsequent deletion of them further delayed the award, to its competitive disadvantage. In light of these allegations of impropriety on the part of the Air Force, Magneco maintains it should receive the award based on its low offer submitted on October 21, 1988.

Magneco states that it protested all of the amendments to the RFP. Based on the record before us, however, if Magneco could be considered to have protested any of the amendments, it would be only with respect to amendment 0003. As previously indicated, prior to the issuance of that amendment, the protester formally expressed its opposition to the proposed amendment, but the agency issued the amendment, notwithstanding Magneco's objections.

With the exception of the protester's objections to the "Blue Ribbon" clauses after the issuance of amendment 0003, the record bears no indications that Magneco further protested amendment 0003 or 0004 to the Air Force. Regarding Magneco's allegations here that it was prejudiced by the agency's inclusion and subsequent deletion of the "Blue Ribbon" clauses, although the protester objected to that change in the RFP after amendment 0003 was issued, as previously noted the Air Force deleted those clauses (as

well as the change to the FMS number), through amendment 0004. There is no indication of record that Magneco further pursued that issue with the agency after those clauses were deleted from the RFP. Magneco also did not protest either amendment to the General Accounting Office between January 24, when the agency first took adverse action (following Magneco's objection to amendment 0003) by issuing the amendment, and March 1, the next closing date for receipt of proposals.

A protest based upon alleged improprieties which are incorporated into the solicitation after the initial solicitation was issued must be protested prior to the next closing date for receipt of proposals where the improprieties complained of were apparent prior to that time. 4 C.F.R. § 21.2(a)(1) (1988). Therefore, to the extent that the protester objects that amendment 0003 or 0004 rendered the RFP defective, the protest allegation is untimely since it was not raised prior to the March 1 closing date. To the extent Magneco alleges that amendments 0003 and 0004 prejudiced its competitive price advantage with respect to its October 21 offer, the protest is also untimely since Magneco was aware of this potential result more than 10 days prior to its filing of this protest. That the protester was aware that it might be underpriced by its competitor is indicated by the fact that with reference to amendment 0003, this protest parallels the objections Magneco raised to the Air Force in its January 6 letter. Consequently, Magneco's protest that its ability to compete for the award was prejudiced by the two amendments to the solicitation after the submission of offers on October 21 is untimely.

We note, concerning amendments 0003 and 0004, that the protester incorrectly contends that the agency should have obtained the two additional FMS requirements (and impliedly, the four new Air Force requirements) through "options or multiple add-ons" to the awarded contract instead of amending the solicitation to include them. In this instance, such an action would have essentially constituted an improper noncompetitive acquisition of goods through the modification of an existing contract since there was a known need for those goods prior to award. See Techplan Corp., B-232187, Dec. 12, 1988, 88-2 CPD ¶ 580.

Furthermore, the agency's issuance of amendment 0003 to increase the quantity requirements from 36 to 42 was not, as the protester maintains, arbitrary or capricious, since a significant change in the government's requirements as to quantity (here, 16 percent at an additional cost of approximately \$50,700) is a proper basis for the issuance of

an amendment after receipt of proposals and a request for revised proposals. Federal Acquisition Regulation (FAR) § 15.606(a) (FAC 84-16); Teledyne CME--Request for Reconsideration, B-228368.3, June 20, 1988, 88-1 CPD ¶ 582. As we explained a similar situation in HLJ Management Group, Inc., B-225843.3, Oct. 20, 1988, 88-2 CPD ¶ 375, during the period of the procurement, the agency's requirements changed to an extent that it was only reasonable to request offerors to reconsider their proposals in view of the changed requirements.

Magneco also contends that the Air Force engaged in technical leveling and auctioneering of the procurement by amending the solicitation's quantity requirements and listing its name in the RFP as an approved source since that gave Varian an opportunity and an incentive to lower its price. This protest basis is also untimely. The agency's request for revised price proposals after the amendment of the RFP essentially constituted a request for best and final offers. See Braswell Shipyards, Inc., B-233288, Jan. 3, 1989, 89-1 CPD ¶ 3; Metron Corp., B-227014, June 29, 1987, 87-1 CPD ¶ 642. As previously discussed herein, Magneco did not protest to our Office the amendments to the RFP or the agency's request for revised offers before the closing date; rather, it continued to compete for the contract by submitting a proposal revised in light of the RFP changes effected by those amendments. After having submitted its lower priced revised offer along with its competitor, the protester may not complain, after it was not selected for award, that the amendments to the RFP should not have been issued. Turner Int'l, Inc., B-232049, Nov. 3, 1988, 88-2 CPD ¶ 434; see Oakland Scavenger Co., B-232958.2, Feb. 1, 1989, 89-1 CPD ¶ 101; Oakland Scavenger Co.--Request for Reconsideration, B-232958.3, June 1, 1989, 89-1 CPD ¶ 541 at 5.

Magneco also suggests that during the period after its product received technical approval and before the contract was awarded, the agency may have improperly disclosed Magneco's proposed price to Varian. As a basis for this allegation, Magneco refers to Varian's reduction in its price proposal and to telephone calls which the protester received during this period concerning information it considered competition sensitive which was contained in its proposal. The protester alleges that the agency divulged to individuals outside the government information concerning its business arrangements and, therefore, may have also revealed its proposed price. The Air Force denies that it disclosed any such information concerning Magneco's offer.

A price reduction in a competitor's best and final offer is an insufficient basis to support a conclusion that the agency disclosed the protester's pricing information where, as here, the record fails to show any evidence of such action. Le Don Computer Servs., Inc., B-275451, Jan. 9, 1987, 87-1 CPD ¶ 46. Further, we will not reach a finding of improper action on the part of an agency based on conjecture or inference such as the protester's receipt of inquiries from other firms or individuals concerning its business arrangements. See Keystone Eng'g Co., B-228026, Nov. 5, 1987, 87-2 CPD ¶ 449 at 5. This basis of protest is, therefore, dismissed. Id.

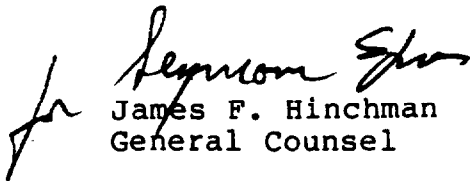
Magneco also protests that the Air Force did not seriously consider its offer for purposes of awarding the contract because the agency did not conduct a pre-award survey upon it following its submission on October 21 of the low offer. The RFP stated in Section L, Clause 117(a), "If [the offeror's] response to this solicitation is favorably considered, a survey team may contact your facility to determine [the offeror's] ability to perform." (Emphasis added.) It is apparent from this statement that a pre-award survey of an offeror's facilities was not a condition of the agency's consideration of, and award to an offeror. An agency is not required to conduct a pre-award survey if information on hand or readily available is sufficient to allow the contracting officer to make a determination of the offeror's responsibility. See FAR § 9.106-1 (FAC 84-25). Further, whether to conduct a pre-award survey is a matter within the discretion of the contracting officer. Automated Data Management, Inc., B-234549, Mar. 2, 1989, 89-1 CPD ¶ 229. Thus, Magneco's allegation that the Air Force did not consider its proposal because it did not conduct a pre-award survey on the company is dismissed as only speculation. Id.

Finally, Magneco contends that the Air Force improperly awarded the contract to a firm that was not an approved source, since prior to the award of the contract, the division of Varian which competed for the contract was sold to another firm that had not been previously designated as an approved source. The Air Force responds that although Varian did, in fact, sell the division of the firm that would have performed the contract, the sale included all aspects of that division, including the product line, physical plant, equipment, all relevant data (drawings), and current contracts. According to the record, the majority of the former employees in that division are also expected to transfer their employment to the new firm. The agency further states that the transfer of the contract from Varian to the purchasing firm will be accomplished through a

novation agreement, and that under these circumstances no further qualification of the new firm is required.

In an analogous case, Caelter Indus., Inc., 64 Comp. Gen. 507 (1985), 85-1 CPD ¶ 522, in which the acceptability of a successor corporation to a previously qualified contractor was in question because the solicitation contained prior production qualification requirements, we held that in such corporate transfer cases, the contracting agency may look to the actual circumstances of the transfer to determine whether there have been changes in the factors that impact upon the quality and reliability of the product itself. If there have been no substantive changes in the product manufacturing process or staff of a previously qualified predecessor company, the successor corporation may be determined to meet the qualifying requirement. Id. at 5. Since the instant case involves a similar corporate transfer, we see no reason to object to the award under the circumstances of this case. The protest is, therefore, denied on this basis.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel